

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

YARITZA HERNANDEZ,
Plaintiff,

v.

MGM RESORTS INTERNATIONAL, et al.,
Defendants.

Case No. 2:24-cv-00725-GMN-BNW

**ORDER AND REPORT AND
RECOMMENDATION**

Before the Court is Defendants' Motion to Dismiss. ECF No. 13. Plaintiff opposed (ECF No. 20), and Defendants replied. ECF No. 21. Because the First Amended Complaints lacks sufficient factual allegations to plausibly state claims for FMLA interference; negligent infliction of emotional distress; negligent hiring; and negligent training, retention, and supervision, the Court recommends granting the Motion in part and dismissing Plaintiff's first, fourth, and fifth causes of action. But given that Plaintiff could allege additional facts that would entitle her to relief, the Court recommends that she be granted leave to amend her claims. As to Plaintiff's remaining claims—which plausibly allege disability discrimination in violation of the ADA and state law—the Court recommends denying Defendant's Motion in part and allowing the claims to proceed.

Based on Plaintiff's counsel's recent withdrawal and Plaintiff's current pro se representation, the Court refers the case to the Pro Bono Program. The Court also recommends that the case be stayed pending appointment of pro bono counsel because Plaintiff has surviving claims and may wish to file an amended complaint.

I. BACKGROUND

Plaintiff Yaritza Hernandez sues Aria,¹ her former employer, alleging discrimination and retaliation in violation of the FMLA, the ADA, and state law, as well as negligent infliction of

¹ Plaintiff also named MGM Resorts International in her suit but has since agreed to dismiss it as a defendant. *See* ECF No. 20 at 1.

1 emotional distress and negligent hiring, retention, and supervision. *See generally* ECF No. 6.
2 Plaintiff's claims arise out of absences she took from work for breast cancer treatment and
3 cancer-related pain. *See id.* at ¶¶ 19–32. She alleges that she received her breast cancer diagnosis
4 before she began working at Aria in October 2021 and that Aria knew about her condition. *Id.* at
5 ¶¶ 16, 19–20. According to Plaintiff, though Aria twice denied her requests to take FMLA leave,
6 her supervisors allowed her to take absences for treatment. *Id.* at ¶¶ 21–22. Later, Plaintiff
7 alleges, Aria approved her third request for Intermittent FMLA leave in April 2023 but fired her
8 mere weeks later, citing attendance policy violations. *Id.* at ¶¶ 25–32.

9 Following her termination, Plaintiff submitted disability discrimination charges to the
10 Nevada Equal Rights Commission, which were later taken over by the Equal Employment
11 Opportunity Commission. *Id.* at ¶¶ 9–10. The EEOC issued Plaintiff a right-to-sue letter on
12 February 14, 2024. *Id.* at ¶¶ 11, 33. Plaintiff filed suit two months later. ECF No. 1.

13 Defendants move the Court to dismiss all Plaintiff's causes of action for failure to state a
14 claim. ECF No. 13. Plaintiff opposes, arguing that she alleges sufficient facts to state plausible
15 claims. ECF No. 20. After the Motion was fully briefed and the parties participated in an Early
16 Neutral Evaluation, Plaintiff's counsel withdrew from the case. ECF No. 26. Plaintiff has
17 represented herself pro se since. *See, e.g.*, ECF Nos. 28, 31–32, 34.

18 **II. LEGAL STANDARD**

19 A pleading must contain “[a] short and plain statement of the claim showing that the
20 pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). While Rule 8 does not require detailed
21 factual allegations, a properly pled claim must contain enough facts to “state a claim to relief that
22 is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This “demands
23 more than an unadorned, the-defendant-unlawfully-harmed-me accusation”; the facts alleged
24 must raise the claim “above the speculative level.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
25 In other words, a complaint must make direct or inferential allegations about “all the material
26 elements necessary to sustain recovery under *some* viable legal theory.” *Twombly*, 550 U.S. at
27 562 (emphasis in original).

1
2 District courts employ a two-step approach when evaluating a complaint's sufficiency on
3 a Rule 12(b)(6) motion to dismiss. The court must first accept all well-pled factual allegations in
4 the complaint as true, recognizing that legal conclusions are not entitled to the assumption of
5 truth. *Iqbal*, 556 U.S. at 678–79. Mere recitations of a claim's elements, supported by only
6 conclusory statements, are insufficient. *Id.* The court must then consider whether the well-pled
7 factual allegations state a plausible claim for relief. *Id.* at 679. A claim is facially plausible when
8 the complaint alleges facts that allow the court to draw a reasonable inference that the defendant
9 is liable for the alleged misconduct. *Id.* A claim that does not permit the court to infer more than
10 the mere possibility of misconduct has “alleged—but not shown—that the pleader is entitled to
11 relief,” and it must be dismissed. *Twombly*, 550 U.S. at 570.

12 **III. ANALYSIS**

13 Plaintiff's First Amended Complaint brings five causes of action: (1) Violation of the
14 Family Medical Leave Act; (2) Discrimination under the Americans with Disabilities Act;
15 (3) Discrimination and Retaliation under NRS. § 613.330; (4) Negligent Infliction of Emotional
16 Distress; and (5) Negligent Hiring, Retention, and Supervision. *See generally* ECF No. 6.
17 Defendants seeks dismissal of all claims because they contend the FAC contains conclusory
18 assertions devoid of sufficient factual allegations. ECF No. 13. They also assert that Plaintiff's
19 common law tort claims are preempted by state statutes that provide exclusive remedies. *Id.* at
20 16–18. Plaintiff maintains that her causes of action are sufficiently pled and that her tort claims
21 are not preempted. ECF No. 20.

22 Defendants also move to dismiss MGM Resorts International from the suit because
23 Plaintiff solely alleges misconduct by Aria and did not name MGM in her EEOC complaint. ECF
24 No. 13 at 7–10. Plaintiff agrees to its dismissal. ECF No. 20 at 1. The Court therefore
25 recommends that MGM be dismissed with prejudice. As to the remaining claims and arguments,
26 the Court addresses each, in turn, below.

determination, and to inform the employee” of her entitlements. *Id.* at 1134 (citation omitted). The “linchpin” of an interference claim is the right to reinstatement because “the FMLA does not provide leave for leave’s sake, but instead provides leave with an expectation that an employee will return to work after the leave ends.” *Sanders*, 657 F.3d at 778 (internal quotations and citations omitted). “Thus, evidence that an employer failed to reinstate an employee who was out on FMLA leave to her original (or an equivalent) position establishes a prima facie denial of the employee’s FMLA rights.” *Id.*

To assert a prima facie case for FMLA interference, an employee must establish that (1) she was eligible for the FMLA’s protections, (2) her employer was covered by the FMLA, (3) she was entitled to leave under the FMLA, (4) she provided sufficient notice of her intent to take leave, and (5) her employer denied her FMLA benefits to which she was entitled. *Id.* An employee can prove this claim by using either direct or circumstantial evidence—or both. *Bachelder*, 259 F.3d at 1125. The Court addresses each element in turn.

First, Plaintiff fails to allege that she was eligible for FMLA leave. The FMLA covers employees who have worked for a covered employer for at least 12 months and for at least 1,250 hours during the previous 12-month period. 29 U.S.C. § 2611(2). Plaintiff states that she began working at Aria on October 12, 2021. ECF No. 6 at ¶ 16. She alleges that between October 2021 and March 2023, she requested to take FMLA leave twice but was denied each time. *Id.* at ¶ 21. But, according to Plaintiff, when she requested FMLA leave a third time, she was approved for Intermittent FMLA leave on April 13, 2023. *Id.* at ¶¶ 25–26. Although it appears that Plaintiff was eligible timewise when her third request was granted in April 2023, it is unclear whether she met the hours requirements. Plaintiff therefore fails to sufficiently plead the first element.²

Second, Plaintiff fails to allege that Aria is covered by the FMLA. The FMLA covers private-sector employers who employ 50 or more employees for at least 20 workweeks in the

² District courts within this Circuit have confirmed that employee eligibility and employer coverage must be alleged by specific factual contentions to plausibly state a claim for FMLA interference at the pleading stage. *See, e.g., Craft v. Burris*, No. CV 16-166-BLG-TJC, 2017 WL 4891520, at *4 (D. Mont. Oct. 30, 2017); *Lee v. Delta Air Lines Inc.*, No. CV 20-8754-CBM-(JEMx), 2021 WL 4527955, at *10 n.23 (C.D. Cal. Aug. 23, 2021) (collecting cases).

1 current or preceding calendar year. 29 C.F.R. § 825.104(a). Because the FAC lacks any
 2 allegations regarding Aria’s FMLA coverage, the second element too is insufficiently pled.

3 **Third**, assuming for the sake of argument that Plaintiff was FMLA eligible (*i.e.*, met the
 4 time and hours requirements), Plaintiff sufficiently pleads that she was entitled to FMLA leave.
 5 An employee is entitled to FMLA leave if she has “a serious health condition that makes the
 6 employee unable to perform the functions of the position.” 29 U.S.C. § 2612(a)(1)(D). A
 7 “serious health condition” includes a “physical [] condition” that involves “continuing treatment
 8 by a healthcare provider.” *Id.* § 2611(11); 29 C.F.R. § 825.113. Plaintiff states that in June 2021,
 9 she was diagnosed with breast cancer that required her to take leave for treatment and cancer-
 10 related pain between October 2021 and March 2023. ECF No. 6 at ¶¶ 19, 22. Thus, Plaintiff
 11 plausibly alleges the third element.

12 **Fourth**, Plaintiff plausibly asserts that she provided Aria sufficient notice of her intent to
 13 take leave. FMLA regulations state that notice must be given at least 30 days in advance if the
 14 need for leave is foreseeable, or “as soon as practicable” otherwise. 29 C.F.R. § 825.302(a). But
 15 an “employee need not expressly assert rights under the FMLA or even mention the FMLA”; it is
 16 sufficient to simply “state that leave is needed.” *Bachelder*, 259 F.3d at 1130 (quoting 29 C.F.R.
 17 § 825.302(c)). Thus, “employees need only notify their employers that they will be absent under
 18 circumstances which indicate that the FMLA might apply.” *Id.* And Plaintiff sufficiently alleges
 19 that she did so here when—beginning in October 2021— she requested and took time off for
 20 cancer treatment as well as submitted medical documentation before she was approved for
 21 FMLA leave in April 2023. ECF No. 6 at ¶¶ 21–22, 24–25. The fourth element is therefore met.

22 **Fifth**, Plaintiff pleads enough facts to meet the final element: denial of rights. An
 23 employer “cannot use the taking of FMLA leave as a negative factor in employment actions,”
 24 including failing to reinstate an employee after leave. *Bachelder*, 259 F.3d at 1122 (quoting 29
 25 C.F.R. § 825.220(c)). Proximity in time may constitute circumstantial evidence that the leave
 26 was a negative factor in the employer’s decision. *Xin Liu*, 347 F.3d at 1137. Plaintiff alleges that
 27 throughout October 2021 to March 2023, her managers accommodated her leave and attendance
 28

1 requests so that she could receive cancer treatment. ECF No. 6 at ¶¶ 21–22. But later, Plaintiff
 2 contends, when she was approved for and exercised FMLA leave on April 13, 2023, she was
 3 fired weeks later on May 1, 2023 in “retaliation.” *Id.* at ¶¶ 30, 32.

4 Defendants argue that Plaintiff fails to state a claim because she was placed under
 5 investigation due to attendance *before* she took FMLA leave and was terminated because of non-
 6 FMLA-related attendance violations. ECF No. 13 at 11–12. The FAC too states that Plaintiff was
 7 placed on “Suspension Pending Investigation” shortly before she was approved for FMLA leave
 8 and that the *cited* reason for her termination was attendance policy violations. ECF No. 6 at
 9 ¶¶ 23, 31. However, at this juncture, the Court need only determine whether Plaintiff *plausibly*
 10 alleges that her taking FMLA leave constituted a negative factor in Aria’s decision to fire her.
 11 And here, accepting the FAC’s facts as true, the Court draws the reasonable inference that
 12 because Plaintiff’s managers previously accommodated her absences and Aria only fired her
 13 after she exercised FMLA leave, taking leave was a negative factor in the decision to terminate
 14 Plaintiff. Determining whether Aria *actually* fired Plaintiff for taking FMLA leave is not
 15 appropriate at this stage.

16 Because the FAC does not set forth sufficient facts to meet the first two elements,
 17 Plaintiff fails to state a claim for FMLA interference. As such, the Court recommends that the
 18 first cause of action be dismissed. But given that Plaintiff could allege facts that would entitle her
 19 to relief, the Court also recommends that Plaintiff be granted leave to amend her claim.³

20 **B. Claim 2: ADA Failure to Accommodate**

21 Plaintiff next asserts that Aria violated the ADA by failing to provide her with a
 22 reasonable accommodation. ECF No. 6 at ¶¶ 40–46. The ADA treats the failure to provide a
 23 reasonable accommodation as an act of discrimination. 42 U.S.C. § 12112(b)(5)(A) (“[T]he term

24 ³ Defendants argue in their Motion that certain periods of alleged misconduct are time-barred.
 25 ECF No. 13 at 11 n.4. However, an action under the FMLA must generally be brought within
 26 two years “after the date of *the last event constituting the alleged violation* for which the action
 27 is brought.” 29 U.S.C. § 2617(c)(1) (emphasis added). Plaintiff alleges that Aria fired her on
 28 May 1, 2023 for taking FMLA leave, which is the last event constituting the alleged violation.
See ECF No. 6 at ¶¶ 30, 32. Plaintiff filed her initial complaint on April 13, 2024—less than a
 year later—so her FMLA claim is timely filed.

1 ‘discriminate against a qualified individual on the basis of disability’ includes—not making
2 reasonable accommodations. . .”). To assert a prima facie case for discrimination under the
3 ADA, Plaintiff must establish that (1) she is disabled within the meaning of the ADA, (2) she is a
4 qualified individual, and (3) she suffered an adverse employment action because of her
5 disability. *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003). As discussed below, Plaintiff
6 plausibly alleges each element.

7 **First**, Plaintiff states sufficient facts to allege disability. The ADA defines a “disabled
8 person” as an individual who has “a physical or mental impairment that substantially limits one
9 or more of the individual’s major life activities.” *Coons v. Sec’y of U.S. Dep’t of Treasury*, 383
10 F.3d 879, 884 (9th Cir. 2004). Plaintiff asserts that her breast cancer diagnosis required her to
11 take absences from work for treatment and cancer-related pain for a period spanning 1.5 years.
12 ECF No. 6 at ¶¶ 19, 22. Defendants too do not dispute that Plaintiff had a qualifying disability.
13 ECF No. 21 at 5. The first element is therefore met.

14 **Second**, Plaintiff plausibly alleges that she was a qualified individual. A “qualified
15 individual” is “an individual with a disability who, with or without reasonable accommodation,
16 can perform the essential functions of the employment position that such individual holds or
17 desires.” 42 U.S.C. § 12111(8). Plaintiff states that her disability predates her employment with
18 Aria and that Aria knew of her diagnosis. ECF No. 6 at ¶¶ 16, 19–20. She also alleges she
19 received positive manager feedback and HR reviews in her years working there. *Id.* at ¶¶ 18. So
20 the Court can draw a reasonable inference that she was able to perform the essential functions of
21 the job with or without reasonable accommodation as she had already done so for years. *Larkin*
22 *v. Univ. Med. Ctr. of S. Nevada*, No. 2:22-cv-2146-JCM-VCF, 2023 WL 5353400, at *3 (D. Nev.
23 Aug. 21, 2023) (reasonable inference can be drawn that employee is qualified individual where
24 disability predated employment).

25 The Ninth Circuit has also recognized that unpaid medical leave—even an extended
26 medical leave, or an extension of an existing leave period—may be a reasonable accommodation
27 if it does not pose an undue hardship on the employer. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d
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1 1243, 1247 (9th Cir. 1999). And “[o]nce an employer becomes aware of the need for
2 accommodation, that employer has a mandatory obligation under the ADA to engage in an
3 interactive process with the employee to identify and implement appropriate reasonable
4 accommodations” that will enable the employee to perform her job duties. *Humphrey v. Mem’l*
5 *Hosp. Ass’n*, 239 F.3d 1128, 1137 (9th Cir. 2001). Because Plaintiff alleges that Aria knew about
6 her cancer diagnosis and that she could have done her job with the reasonable accommodation of
7 leave to attend doctors’ appointments, Plaintiff has satisfied her burden at the pleading stage. The
8 burden now shifts to Defendants to show that this accommodation would have been an undue
9 hardship to Aria. *Id.* at 1133.

10 Defendants’ argument that Aria did not fail to provide a reasonable accommodation to
11 Plaintiff because she herself admits that her managers “accommodated” her absences for cancer
12 treatment is unpersuasive. *See* ECF No. 13 at 14. Though Plaintiff states her managers
13 “accommodated” her absences in the sense that she was allowed to attend treatment, she also
14 alleges—and Defendants themselves confirm—that Aria’s stated reason for firing her was these
15 very absences. ECF Nos. 6 at ¶¶ 22, 29–31; 13 at 12. Such allowances cannot be a reasonable
16 accommodation if the leave then constitutes attendance policy violations for which the employee
17 can be terminated. Thus, the second element is sufficiently pled.

18 **Third**, Plaintiff plausibly alleges that she suffered an adverse employment action because
19 of her disability. “The link between the disability and termination is particularly strong where it
20 is the employer’s failure to reasonably accommodate a known disability that leads to discharge
21 for performance inadequacies resulting from that disability.” *Humphrey*, 239 F.3d at 1140. And
22 here, Plaintiff states that Aria knew about her cancer diagnosis, she received positive
23 performance reviews during that time period, she could have performed her job with the
24 reasonable accommodation of taking leave for cancer treatment, and Aria fired her for disability-
25 related absences. ECF No. 6 at ¶¶ 18, 20, 29–31, 42–44. This is sufficient to meet the third
26 element.

27 Having alleged sufficient facts for all three elements, Plaintiff states a plausible claim for
28

1 failure to accommodate under the ADA. The Court recommends that Defendants’ Motion be
2 denied in part and that Plaintiff’s second cause of action be allowed to proceed.

3 **C. Claim 3: NRS § 613.330**

4 In her third cause of action, Plaintiff alleges violations of NRS 613.330, Nevada’s
5 employment practices statute, and titles her claim “Discrimination and Retaliation.” ECF No. 6
6 at ¶¶ 47–50. Though Plaintiff uses the term “retaliation” in the claim’s title, she does not allege
7 that Defendants retaliated against her for opposing an unlawful employment practice or because
8 she made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing.
9 *See* NEV. REV. STAT. § 614.340(1). Instead, she alleges that she was fired due to her disability
10 after she was told by her managers that she could take absences for cancer treatment, but such
11 absences later counted as attendance policy violations. ECF No. 6 at ¶¶ 19, 22, 32. Plaintiff
12 therefore brings a claim for discrimination, not retaliation. *See Bullard v. Las Vegas Valley*
13 *Water Dist.*, No. 2:15-cv-00948-JAD-VCF, 2018 WL 715358, at *3–5 (D. Nev. Feb. 5, 2018).

14 NRS 613.330 “is a codified, state-law amalgam” of federal statutory schemes, including
15 the ADA. *Id.* at *4. Thus, a claim for disability discrimination under NRS 613.330 is evaluated
16 using the same standard as a claim for disability discrimination under the ADA. *Pope v. Motel 6*,
17 114 P.3d 277, 280 (Nev. 2005). Because Plaintiff states a plausible claim for disability
18 discrimination under the ADA based on Defendants’ alleged failure to accommodate, she states a
19 claim for disability discrimination under state law as well. As such, the Court recommends
20 denying Defendants’ Motion as to Plaintiff’s third cause of action.

21 **D. Claim 4: NIED**

22 Plaintiff’s fourth claim is for NIED. ECF No. 6 at ¶¶ 51–55. Defendants move for
23 dismissal of Plaintiff’s fourth and fifth causes of action because they contend those are
24 preempted by state statutes. ECF No. 13 at 16–17. They also argue that even if Plaintiff’s NIED
25 claim is not preempted, it fails to state a claim. *Id.* at 18–19. The Court first analyzes the issue of
26 preemption and then discusses whether Plaintiff fails to state a claim.

1 ***1. Preemption***

2 Defendants assert that Plaintiff’s common law tort claims are preempted by state statutes
3 that serve as the “exclusive remedy” for employment claims and injuries that occurred at work.
4 ECF No. 13 at 16–17. First, Defendants argue that Plaintiff’s fourth and fifth claims are barred
5 by NRS 613.330. Next, Defendants contend that such claims are preempted by the Nevada
6 Industrial Insurance Act. The Court addresses each argument, in turn, below.

7 i. NRS § 613.330

8 Defendants assert that it is “well-settled” that NRS 613.330 provides the “exclusive
9 remedy” for claims based on unlawful employment practices. ECF No. 13 at 16. According to
10 Defendants, because all common law tort claims based on employment discrimination are
11 remedied by NRS 613.330, the statute preempts Plaintiff’s NIED and Negligent Hiring,
12 Retention, and Supervision claims. *Id.* (citing *Brinkman v. Harrah’s Operating Co., Inc.*, No.
13 2:08-cv-00817-RCJ-PAL, 2008 WL 11389180, at *3 (D. Nev. Oct. 16, 2008)). However,
14 Defendants conflate NRS 613.330’s bar of a common law *tortious discharge* claim with a bar of
15 *all* common law tort claims.

16 Under Nevada law, employees are presumed to be employed “at-will.” *Dillard Dep’t*
17 *Stores, Inc. v. Beckwith*, 989 P.2d 882, 884–85 (Nev. 1999). The at-will rule gives an employer
18 the right to discharge an employee for any reason, or for no reason at all. *Id.* However, the
19 Nevada Supreme Court has recognized an exception to this general rule where an employer
20 terminates an employee in a manner that violates public policy. *Id.* In such a case, the terminated
21 employee may bring a common law cause of action for tortious discharge. *Id.*

22 But the Nevada Supreme Court has declined to recognize tortious discharge claims where
23 a “comprehensive statutory remedy” exists. *Shoen v. Amerco*, 896 P.2d 469, 475 (Nev. 1995);
24 *Sands Regent v. Valgardson*, 777 P.2d 900, 901 (Nev. 1989). For example, in *Sands Regent*, the
25 court refused to recognize a tortious discharge claim for age discrimination because it found that
26 the Legislature had already addressed Nevada’s public policy against age discrimination when it
27 defined the extent of the remedy available in NRS 613.310, Nevada’s anti-discrimination statute.

1 777 P.2d at 901. Because the plaintiff could recover adequate damages for his termination under
 2 NRS 613.330, the court held that his tortious discharge claim was precluded by the statute. *Id.*

3 “Although the Nevada Supreme Court has addressed the issue of statutory preclusion of
 4 tortious discharge in violation of public policy, the court has not directly addressed the issue of
 5 the anti-discrimination statute’s preclusion of other common law tort claims.” *Pasinger v.*
 6 *Starbucks Corp.*, No. 3:07-cv-00452-BES-VPC, 2008 WL 11399722, at *4 (D. Nev. Sept. 30,
 7 2008) (internal citations omitted). But “[i]n *Shoen*, the Nevada Supreme Court implied that other
 8 common law tort claims may stand even though a claim for tortious discharge arising from the
 9 same incident is precluded by the existence of a statutory remedy.” *Id.* (citing 896 P.2d at 476–
 10 77). Thus, Courts in this District have found that the Nevada Supreme Court “has barred *only*
 11 *tortious discharge claims, and no other tort claims*, when adequate anti-discrimination statutory
 12 remedies exist.” *Heegel v. Nev. Prop. 1 LLC*, No. 2:20-cv-00001-APG-BNW, 2020 U.S. Dist.
 13 LEXIS 222997, *5 (D. Nev. Nov. 25, 2020) (emphasis added); *see also Kraja v. Bellagio, LLC*,
 14 202 F. Supp. 3d 1163, 1173 (D. Nev. 2016) (same); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081,
 15 1094 (9th Cir. 2011) (“Nevada courts will not construe a statute as eliminating a common law
 16 cause of action unless the statute unambiguously requires that result.”).

17 This interpretation is consistent with this Court’s previous finding that the case Defendants
 18 quote for the proposition that all common law tort claims are preempted, *Brinkman*, 2008 WL
 19 11389180, at *3, “cites no authority for [the proposition] (and the Court has not located any
 20 either).” *Schrader v. Wynn Las Vegas, LLC*, No. 2:19-cv-02159-JCM-BNW, 2020 WL 8513790, at
 21 *4 n.5 (D. Nev. Dec. 9, 2020). This Court further noted that, “at least in this context, this rule
 22 appears inconsistent with Nevada Supreme Court cases discussing NRS 613.330 and the text of
 23 the statute itself.” *Id.* For these reasons, the Court rejects Defendants’ argument that NRS 613.330
 24 bars Plaintiff’s fourth and fifth claims.

25 ii. NIIA

26 Defendants argue that the NIIA, the Nevada workers’ compensation statute, also bars
 27 Plaintiff’s common law tort claims because her alleged injuries are based on conduct that

1 occurred during her employment. ECF No. 13 at 18. As with NRS 613.330, Plaintiff maintains
2 that her claims are not preempted. ECF No. 20 at 5–6.

3 The NIIA governs workers’ compensation benefits. *See Richards v. Republic Silver State*
4 *Disposal, Inc.*, 148 P.3d 684, 687 (Nev. 2006) (“The NIIA’s reciprocal terms generally require
5 employers to provide workers’ compensation coverage to their industrially injured employees
6 and then immunize those employers from any suit brought on account of those injuries.”). “The
7 exclusive remedy provision of the NIIA provides that ‘[t]he rights and remedies. . . for an
8 employee on account of an injury by accident sustained arising out of and in the course of the
9 employment shall be exclusive.’” *Conway v. Circus Circus Casinos, Inc.*, 8 P.3d 837, 839 (Nev.
10 2000) (quoting NEV. REV. STAT. § 616A.020(1)).

11 An “injury” is defined as “a sudden and tangible happening of a traumatic nature,
12 producing an immediate or prompt result which is established by medical evidence.” *Id.*
13 § 616A.265(1). The statute defines “accident” as “an unexpected or unforeseen event happening
14 suddenly and violently, with or without human fault, and producing at the time objective
15 symptoms of an injury.” *Id.* § 616A.030.

16 Plaintiff’s NIED and Negligent Hiring, Retention, and Supervision claims are based on
17 allegations that Defendants interfered with Plaintiff’s FMLA protections and failed to reasonably
18 accommodate her disability. ECF No. 6 at ¶¶ 51–61. Thus, Plaintiff’s purported harms “were
19 neither sudden nor a tangible traumatic event that produced an immediate or prompt result
20 established by medical evidence,” so Plaintiff did not suffer an “injury by accident” during the
21 course of employment. *Colvin v. M.J. Dean Constr., Inc.*, No. 2:20-cv-01765-APG-EJY, 2021
22 WL 1680196, at *3 (D. Nev. Apr. 7, 2021) (conduct constituting alleged employment
23 discrimination did not fall under NIIA bar); *Holcomb v. Model T Casino Resort LLC*, No. 3:22-
24 cv-00094-MMD-CSD, 2024 WL 1619362, at *3 (D. Nev. Mar. 20, 2024) (same). As such, the
25 Court also rejects Defendants’ argument that the NIIA bars Plaintiff’s common law tort claims.

2. *Failure to State a Claim*

Defendants contend that even if Plaintiff's NIED cause of action is not preempted, she fails to allege sufficient facts to state a plausible claim. ECF No. 13 at 18–19. Defendants first argue that NIED claims can only be brought by bystanders, not direct victims. *Id.* at 18. Alternatively, they assert that Plaintiff's claim fails because an allegedly discriminatory termination does not amount to extreme and outrageous conduct in and of itself. *Id.* at 19.

Defendants are mistaken on the law regarding direct victims. Nevada recognizes “an NIED claim by a direct victim,” which “has the same elements as an intentional infliction of emotional distress claim, except that the plaintiff need only show that the acts causing distress were committed negligently.” *Armstrong v. Reynolds*, 22 F.4th 1058, 1081 (9th Cir. 2022) (citing *Abrams v. Sanson*, 458 P.3d 1062, 1070 (Nev. 2020)). To state an IIED or NIED claim, a plaintiff must allege that (1) the defendant engaged in “extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress,” (2) the plaintiff “suffered severe or extreme emotional distress,” and (3) “actual or proximate causation.” *Star v. Rabello*, 625 P.2d 90, 91–92 (Nev. 1981). For NIED claims brought for negligent actions committed directly against a plaintiff, “either a physical impact must have occurred or. . . proof of serious emotional distress causing physical injury or illness must be presented.” *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1387 (Nev. 1998) (internal quotations omitted). Thus, Defendants are correct that Plaintiff's stated facts fall short of meeting these elements.

First, the FAC lacks allegations rising to the level of extreme and outrageous conduct. To be extreme and outrageous, conduct must be “outside all possible bounds of decency” and regarded as “utterly intolerable in a civilized community.” *Maduike v. Agency Rent-A-Car*, 953 P.2d 24, 26 (Nev. 1998) (internal quotations and citation omitted). And as Defendants point out, a purportedly discriminatory termination, on its own, does not clear that bar. *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 911 (D. Nev. 1993) (“termination of employees, even in the context of a discriminatory policy, does not in itself amount to extreme and outrageous conduct”); *Welder v. Univ. of S. Nevada*, 833 F. Supp. 2d 1240, 1245 (D. Nev. 2011) (acts based on “normal

1 employment relations” fall short of extreme and outrageous conduct). Because Plaintiff simply
2 states that Defendants fired her for taking manager-accommodated absences and FMLA leave,
3 ECF No. 6 at ¶ 53, she fails to plausibly allege the first element.

4 **Second**, Plaintiff does not sufficiently allege severe emotional distress. General physical
5 or emotional discomfort is insufficient to demonstrate severe emotional distress—a plaintiff must
6 allege such “serious emotional distress” that it “results in physical symptoms.” *Chowdhry v.*
7 *NLVH Inc.*, 851 P.2d 459, 482 (Nev. 1993). But here, Plaintiff only vaguely states that she has
8 suffered a “worsening of her overall mental and physical condition.” ECF No. 6 at ¶ 54. These
9 are precisely the sorts of allegations that fall short of severe emotional distress, so this element
10 too fails.

11 **Third**, Plaintiff plausibly pleads actual or proximate causation. She alleges that
12 Defendants knew about her diagnosis, allowed her to miss work for treatment, and granted her
13 FMLA leave only to fire her weeks later for absences that she believed were excused. *Id.* at ¶ 53.
14 This, she claims, caused her to suffer “serious emotional distress” and worsened her mental and
15 physical condition. *Id.* at ¶ 54. The third element is therefore satisfied.

16 **Fourth**, the FAC lacks well-pled factual allegations of “physical impact” or “physical
17 injury or illness.” Because physical manifestations must occur to state a direct-victim NIED
18 claim, Plaintiff fails to meet this additional requirement.

19 Due to these shortfalls, the Court recommends dismissal of Plaintiff’s fourth cause of
20 action. But because it is not clear that amendment would be futile, the Court recommends
21 permitting Plaintiff leave to amend.

22 **E. Claim 5: Negligent Hiring, Retention, and Supervision**

23 Plaintiff’s final claim is titled “Negligent Hiring, Retention, and Supervision.” ECF No. 6
24 at ¶¶ 56–61. As discussed above, this common law tort claim is not preempted by state statutes.
25 *See supra* § D.1. But Defendants assert, nonetheless, that Plaintiff fails to state a claim. ECF
26 No. 13 at 20–21.

27 Despite Plaintiff’s naming convention, “Nevada courts recognize two separate torts—one
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1 for negligent hiring and another for negligent training, supervision, and retention—but not one
 2 that merges them together.” *Sanchez v. Albertson’s LLC*, No. 2:19-cv-02017-JAD-DJA, 2022
 3 WL 2982926, at *2 (D. Nev. July 27, 2022) (citing *Vaughan v. Harrah’s Las Vegas, Inc.*, 238
 4 P.3d 863 (Nev. 2008)). Negligent hiring “imposes a general duty on an employer to conduct a
 5 reasonable background check on a potential employee to ensure that” he or she is suitable for the
 6 position. *Burnett v. C.B.A. Sec. Serv., Inc.*, 820 P.2d 750, 789 (Nev. 1991) (citation omitted).
 7 Because the FAC makes no mention of background checks, the Court will interpret this claim as
 8 one for negligent training, supervision, and retention. *See Sanchez*, 2022 WL 2982926, at *2.

9 The elements of a negligent training, supervision, and retention claim are (1) a general
 10 duty on the employer to use reasonable care in the training, supervision, and retention of
 11 employees to ensure that they are fit for their positions, (2) breach, (3) injury, and (4) causation.
 12 *Id.* (citations omitted). Plaintiff fails to allege sufficient facts to meet all the elements.

13 **First**, Nevada recognizes that an “employer has a duty to use reasonable care in the
 14 training, supervision, and retention of his or her employees to make sure that the employees are
 15 fit for their positions.” *Hall v. SSF, Inc.*, 930 P.2d 94, 99 (Nev. 1996). Thus, the first element is
 16 met.

17 **Second**, Plaintiff does not plausibly allege breach. To prevail on a negligent training,
 18 supervision, and retention claim, a plaintiff must allege facts specifically indicating how the
 19 employer violated its duty. *Colquhoun v. BHC Montevista Hospital, Inc.*, No. 2:10-cv-00144-
 20 RLH-PAL, 2010 WL 2346607, at *3 (D. Nev. June 9, 2010). The fact that an employee acts
 21 wrongfully or negligently does not in and of itself give rise to such a claim, as there must also be
 22 evidence that the employer was negligent in ensuring their fitness for the position. *Id.*; *Vinci v.*
 23 *Las Vegas Sands, Inc.*, 984 P.2d 750, 751 (Nev. 1999). Because Plaintiff makes no factual
 24 allegations regarding Aria’s training—or lack thereof—of her managers, the second element
 25 fails. *See Haro v. KRM, Inc.*, No. 2:20-cv-02113-APG-DJA, 2022 WL 980249, at *7 (D. Nev.
 26 Mar. 30, 2022).

27 **Third**, Plaintiff sufficiently states an injury. She alleges that because of her termination,
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1 she suffered loss of income and employment benefits as well as emotional distress. ECF No. 6 at
2 ¶¶ 54, 60. Thus, the third element is satisfied.

3 **Fourth**, Plaintiff fails to plausibly plead causation. Though she broadly asserts that Aria
4 and her supervisors failed to make proper FMLA and ADA arrangements for her, it is unclear
5 from Plaintiff's allegations whether such decisions were made by Aria, her employer, or her
6 managers, Aria's employees. *See id.* at ¶ 59. Because of these factual deficiencies, it is not clear
7 whether the responsible person was an employee and if so, whether that employee had been
8 negligently supervised and trained. Without such allegations, the Court cannot discern whether
9 Aria's training (or lack thereof) was the cause of Plaintiff's termination. *Sanchez*, 2022 WL
10 2982926, at *3. Thus, causation is insufficiently pled.

11 Having failed to satisfy the elements, the Court recommends granting Defendants'
12 Motion in part and dismissing Plaintiff's fifth claim. But as with Plaintiff's other causes of
13 action, the Court recommends providing her leave to amend to potentially cure these
14 deficiencies.

15 **F. Punitive Damages**

16 Lastly, Defendants seek to "dismiss" Plaintiff's prayer for punitive damages because they
17 contend that she has not pled sufficient facts under Nevada law or the ADA and because such
18 damages are not available under the FMLA. ECF No. 13 at 21–22. Plaintiff asserts that she
19 sufficiently pleads punitive damages under Nevada law because she states that Defendants'
20 conduct is "intentional" and "willful." ECF No. 20 at 7.

21 "Punitive damages are a remedy, not a claim, but a plaintiff must still plead the facts to
22 support an award of punitive damages to maintain a prayer for them" in her complaint. *Bonavito*
23 *v. Nevada Prop. 1 LLC*, No. 2:13-cv-417-JAD-CWH, 2014 WL 1347051, at *1 (D. Nev. Apr. 2,
24 2014). The Court "dismisses" claims but "strikes" impertinent allegations and requests for a
25 remedy. *Frank v. City of Henderson*, No. 2:12-cv-01988-JAD, 2015 WL 5562582, at *3 n.35 (D.
26 Nev. Sept. 21, 2015). So if Plaintiff does not sufficiently plead punitive damages, the Court will
27 strike—rather than dismiss—Plaintiff's prayer for said damages.

1 Defendants are correct that punitive damages are not recoverable under the FMLA.
2 *Farrell v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 530 F.3d 1023, 1025 (9th Cir. 2008).
3 NRS 613.330 too does not authorize an award of punitive damages. *Sternquist v. Humble Hearts*
4 *LLC*, No. 2:19-cv-00448-JAD-BNW, 2021 WL 3134902, at *4 (D. Nev. July 23, 2021). And
5 although punitive damages are available for Plaintiff’s ADA and Nevada tort claims, she fails to
6 allege sufficient facts entitling her to such relief.

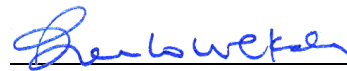
7 While punitive damages can be awarded in failure-to-accommodate cases under the
8 ADA, 42 U.S.C. § 1981a(a)(1), a plaintiff must demonstrate that the employer engaged in a
9 discriminatory practice “with malice or with reckless indifference to the federally protected
10 rights of an aggrieved individual.” *Id.* § 1981a(b)(1). The terms “malice” or “reckless
11 indifference” pertain to an employer’s knowledge that it may be acting in violation of federal
12 law. *Kolstad v. ADA*, 527 U.S. 526, 535 (1999). And here, the FAC lacks any allegations
13 regarding Defendants’ knowledge of its alleged violations, so Plaintiff has not pled sufficient
14 facts for punitive damages under the ADA.

15 As to Plaintiff’s Nevada tort claims—NIED and Negligent Hiring, Retention, and
16 Supervision—punitive damages are only available for torts involving oppression, fraud, or
17 malice. NEV. REV. STAT. § 42.005. Nevada law defines malice as conduct “intended to injure a
18 person or despicable conduct [that] is engaged in with a conscious disregard of the rights or
19 safety of others.” *Id.* § 42.001(3). Plaintiff fails to allege these requisite facts. She does nothing
20 more than include terms like “willful,” “wanton,” and “malicious” with no explanation as to how
21 Defendants’ acts were done with the intent to injure her or how they rise to the level of
22 “despicable conduct.” ECF No. 6 at ¶ 34. This is insufficient for punitive damages. *Bonavito*,
23 2014 WL 1347051, at *1.

24 Because Plaintiff fails to set forth sufficient facts under either statutory scheme, the Court
25 recommends striking the allegations referencing punitive damages. *See* ECF No. 6 at 28 ¶ 4.
26 However, the Court also recommends that Plaintiff be given leave to amend her punitive
27 damages remedy as she could plead additional facts that entitle her to such relief.

1 objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d
2 1153, 1157 (9th Cir. 1991).

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4 DATED this 7th day of February 2025.

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7 BREND A WEKSLER
8 UNITED STATES MAGISTRATE JUDGE
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